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No. 06-100

IN THE
# Supreme Court of the United States

GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, and GOVERNMENT EMPLOYEES INSURANCE COMPANY,
*Petitioners,*

*v.*

AJENE EDO,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## INTRODUCTION

Edo strains to dissuade this Court from reaching the question whether GEICO's interpretation of the adverse-action notice requirement is so unreasonable that it could support a claim of a willful violation. His strategy is understandable, because regardless of whether this Court agrees with GEICO's interpretation or whether willfulness is equated with reckless disregard, GEICO's conduct was not willful as a matter of law.

Edo concedes that the notice requirement's "based on" formulation requires a determination whether consideration of the credit report was the but-for cause of the insurer's adverse action. In ordinary usage, this but-for test should focus (as GEICO did) on whether the consumer was treated worse than if the insurer had not considered his credit report. Edo's alternative focus on how the consumer would have been treated if he had perfect credit is a decidedly peculiar application of the but-for test. It is also at odds with the statute's structure and history—which Edo essentially ignores.

Edo relies almost exclusively on what he claims to be Congress's primary purpose of alerting consumers to potential errors in their credit reports. But it is by no means clear that Congress wanted insurers to send notices to consumers whenever perfect credit scores would have resulted in better rates. Indeed, we know Congress did not impose such expansive notice obligations on credit providers, whose duties the statute sets forth in greater detail. And Edo's view necessarily applies to use of all consumer reports—not just credit reports. Thus, an employer would be required to send an adverse-action notice whenever it denies a job application and a consumer report revealing the "best possible" employment history would have landed the applicant a job. It is doubtful Congress had that in mind.

Even if this Court were to adopt Edo's view of the adverse-action notice requirement, however, his argument that GEICO could be found willfully noncompliant rings

hollow. To begin with, he fails to explain why recklessness should suffice to prove willfulness under 15 U.S.C. § 1681n(a) when (as he concedes) willfulness means an intentional violation of a known legal right in §§ 1681q and r. Edo's attempt to overcome that problem with selective citations to cases interpreting different statutes and structural arguments from other FCRA provisions is unavailing, because the meaning of willfulness varies depending on its particular statutory context and his structural arguments create more anomalies than they solve. At most, Edo demonstrates that the meaning of "willful" in this context is uncertain—which principles of lenity resolve in favor of the more culpable *mens rea*.

The Government, which also disputes GEICO's interpretation of the notice requirement and believes that "willful" means reckless, concedes that GEICO's notification policy was sufficiently well-grounded that its conduct cannot be deemed willful. Resisting that conclusion, Edo insists that the lower courts must be permitted to consider GEICO's subjective awareness of the risk that it was acting unlawfully. But this Court's precedents establish that proof of reckless disregard requires a demonstration both (i) that there was an objectively high and excessive risk that GEICO's conduct was unlawful *and* (ii) that GEICO was aware of that risk. A finding that the law was too unclear to label GEICO's interpretation groundless eliminates any need to explore GEICO's state of mind.

Although Edo protests that precedent and agency guidance should have alerted GEICO to a high likelihood that its notification policy was noncompliant, the Government correctly observes that, at the relevant time, no court had ruled on the issue and the FTC had issued no authoritative interpretation. Even if this Court decides that GEICO was in error, given the district court's agreement with GEICO's position, its conduct cannot be deemed willfully noncompliant as a matter of law.

In a last-ditch attempt to avoid that conclusion, Edo claims that disputes over material facts preclude summary

judgment and that GEICO's questions presented did not invite this Court to apply the law to the facts of this case. Neither objection has merit. Edo's newly manufactured factual issues are both spurious and irrelevant: none affects the objective and purely legal question whether GEICO's policy violated clearly established law. And GEICO's petition for certiorari did request this Court to apply the correct legal standard to the undisputed facts and in so doing give appropriate guidance to the lower courts.

## ARGUMENT

**I.A.** Edo insists that GEICO treated him "adverse[ly]" under § 1681a(k)(1)(B). Resp. Br. 51-52. That is far from obvious,[1] but in any event it begs the question, because FCRA required a notice only if an adverse action was "based in whole or in part on" Edo's credit report. 15 U.S.C. § 1681m(a). This formulation requires proof of a but-for causal relationship between an adverse action and GEICO's consideration of the credit report. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (interpreting "because of" in the ADEA to mean that the illicit factor had a "determinative influence on the outcome").[2]

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[1] Contrary to Edo's argument, "increase" denotes a departure from preexisting treatment (Safeco's interpretation) or perhaps from how the individual would be treated absent consideration of a specified factor (GEICO's view). An insurance company has not "increased" an individual's rate just because it would have offered a lower rate if the individual had a better credit report. And while GEICO did not separately challenge the meaning of "denial" in its petition, whether placement of Edo with GEICO Indemnity constituted a denial by GEICO General is certainly a question on which reasonable minds can differ. *See* Pet. App. 45a (district court finding no denial); Pet. App. 29a (court of appeals finding denial); *see generally* AIA Br. 10-13 (addressing the issue in greater detail).

[2] The Government's contrary citation to *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995), is unavailing. The Court in that case appreciated that the ADEA imposed a but-for causal standard, but focused on a different issue—the effect of an employer's later discovery of a fact that would have justified the employer's action had the employer known of the fact at the time of its action. *Id.* at 356, 360-63. In contrast, GEICO would have established the same premium for Edo, based on the information available at the time, even if it had not

Edo concedes that the statute's "based ... on" formulation imposes a but-for test. Resp. Br. 51. But whereas GEICO asked how it would have treated Edo but for consideration of his credit report, Edo asks how GEICO would have treated him if he had a better credit report. Rather than comparing Edo's application as it is with the same application absent consideration of his credit report, Edo's but-for yardstick is a hypothetical application in which he has improved credit. Edo identifies no precedent for his novel conception of but-for causation.[3] If Congress had shared Edo's vision, it could have articulated his standard in a far more straight-forward manner. Several states have done just that.[4]

**B.** Edo does not seriously engage GEICO's arguments based on the structure of the statute. Instead, he simply proclaims that his reading of the adverse-action notice requirement would better achieve Congress's desire to alert consumers to potential errors in their credit reports. But statutory construction is not advanced by simplistic proclamations about supposedly predominant legislative purposes that ignore the reality of compromises among competing concerns. An appreciation of those competing concerns here belies Edo's insistence that Congress *must* have shared the Ninth Circuit's myopic view.

1. Edo attempts to brush aside FCRA's treatment of the use of consumer reports in reviews of existing customer accounts as not "at issue here." Resp. Br. 56 n.36. But Congress's treatment of existing consumer accounts

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considered the report.

[3] *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001), is inapposite, because the Truth In Lending Act (TILA) expressly compares the prices charged cash purchasers with the prices charged credit purchasers. TILA's causal "baseline" is perfectly clear.

[4] *See, e.g.*, 18-900-906 Del. Code Regs. § 4.1.2 (defining adverse action to include "[c]harging a higher insurance premium than would have been offered if the credit history or insurance score had been more favorable"); Utah Admin. Code r.590-219-3(2)(b) (defining adverse action to include "charging a higher premium than would have been offered if the credit history or credit score had been more favorable").

provides a strong indication of its likely intent concerning initial account applications. The Senate Report explained that no adverse-action notice is required "where a creditor obtains consumer reports on its customers in connection with a review of its credit or other portfolio and, in connection with the review, a consumer's account is not changed, or is changed in a way that is not less favorable to the interest of that consumer, *even if the accounts of other consumers are changed in a more favorable manner.*" S. Rep. No. 104-185, at 32 (1995) (emphasis added). In other words, there has been no adverse action based on a credit report simply because one existing customer is given more preferable terms than another based on superior credit. There is no reason to interpret FCRA to treat new customers differently. In both circumstances, the adverse-action determination should be made by assessing the impact an individual's actual credit report had on *that person's* insurance.

Edo gives similarly short-shrift to the 2003 FACTA Amendments, which for the first time required notice to consumers who, based on their credit information, received less favorable terms than other consumers. Edo argues that this amendment "expand[ed] the definition of adverse action for credit transactions" to bring credit providers' notice obligations in line with those of other users of credit reports. Resp. Br. 56. The obvious problem with that response is that Congress did not treat these new risk-based notices as adverse-action notices; FACTA did not alter FCRA's definition of adverse action or its adverse-action notice requirement. Moreover, if Edo were right, Congress could have achieved its goal simply by removing § 1681a(k)(1)(A)'s reference to the ECOA definition, since in Edo's view the "miscellaneous" provision in § 1681a(k)(1)(B)(iv)(II) already incorporates a far more comprehensive notice requirement.[5]

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[5] Edo relies half-heartedly on the miscellaneous clause, which defines as adverse action any "action taken or determination that is... adverse to the interests of the consumer." But that clause has no application to contexts (such as insurance) for which adverse action is distinctly and

2. Edo protests that GEICO's interpretation of the adverse-action notice requirement fails to achieve Congress's purpose of alerting all consumers to the possibility that potential errors in their credit reports may have affected their terms or rates. His poster child is a hypothetical consumer whose average or above-average credit score has not adversely affected his rate, but who would have received an even better rate if the insurer learned that the credit report was wrong and the consumer in fact had a perfect credit record. Resp. Br. 17. But there is no evidence that Congress instituted the adverse-action notice requirement to inform the vast majority of consumers that a better credit report would produce greater discounts or more favorable terms. Given the nature of the statutory bargain—under which use of credit reports is accompanied by an obligation to advise consumers when that use has adversely affected them—it is more reasonable to suppose that Congress required adverse-action notices only where the user can determine that the credit report actually harmed a consumer.

Edo's interpretation is also flatly contradicted by Congress's treatment of credit providers. Under ECOA, a consumer who accepts an offer of credit at terms less favorable than those applied for does not suffer an adverse action, even if the applicant would have received more favorable terms with a better credit report. 12 C.F.R. § 202.2. Therefore, regardless of the proper interpretation of adverse action in the insurance context, FCRA's notice provision *already* does not capture every instance in which a

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comprehensively defined. *See Nat'l Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("[S]pecific statutory language should control more general language when there is a conflict between the two."); *cf. Varity Corp. v. Howe*, 516 U.S. 489, 490 (1996) ("catchall" in ERISA § 502 was intended "as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 *does not elsewhere adequately remedy*") (emphasis added). Moreover, even in contexts (like rental decisions) where the miscellaneous definition of adverse action applies, it sheds no light on when such adverse actions are "based ... on" consideration of a credit report.

potential inaccuracy could, under respondents view of the statute, "adversely" impact a consumer.

Edo's view of the notice provision would also produce absurd consequences in the employment context. Edo forgets that his "best possible" consumer report standard must necessarily apply to any user's consideration of any type of consumer report, including education verifications, employment verifications, and claims and driving record checks.[6] Thus, under Edo's interpretation, whenever an employer would have hired an applicant if, for example, they had gone to the "best possible" law school or had held the "best possible" previous job, that employer is required to send the disappointed applicant an adverse-action notice. Of course, there are sometimes errors in consumer reports, but it seems highly unlikely that these are the situations with which Congress was concerned, and hard to imagine that Congress meant to achieve 100% accuracy at the cost of requiring adverse-action notices every time the "best possible" consumer information would have made a difference.[7]

Edo also underestimates the confusion that would be sown by sending adverse-action notices to individuals who were unaffected or actually *benefited* by the consideration of their credit reports (*i.e.*, individuals with high but not perfect credit scores). Resp. Br. 56-57. In many situations, such notices would be misleading and their ubiquity would desensitize recipients to their message. The Government glibly retorts that GEICO and other insurers can avoid those difficulties by refraining altogether from using credit reports. U.S. Br. 28-29. But in enacting FCRA, Congress recognized the benefits that flow from the sharing of consumer information.[8] The Act should not be read to put

[6] Nat'l Consumer Law Center, *Fair Credit Reporting* 20-21, 32-33 (5th ed. 2002).

[7] The difficulties in quantifying what "best possible" means with respect to various types of information that are contained in consumer reports also demonstrates the fallacy of Edo's approach.

[8] These benefits include rapid qualification for mortgage, automobile, and retail credit; higher levels of home ownership; more accurate pricing

insurers and other users of consumer information to the Hobson's choice of foregoing those benefits or sending a massive number of misleading "adverse-action" notices.

**II.A.** Both Edo and the Government acknowledge that the term "willfully" in §§ 1681q and r refers to knowingly unlawful conduct. Yet they read the term to mean "reckless disregard" *in § 1681n(a)*—despite this Court's teaching that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Their attempt to splinter "willfully" into separate civil and criminal meanings within the same statute rests on unjustified generalizations from selective precedents and equally unjustified inferences from FCRA's statutory structure. At best, they prove that the statute is not a model of consistency, but even then their argument founders on principles of lenity.

1. The meaning of "willfully" in each case depends on a close examination of its statutory context, *Bryan v. United States*, 524 U.S. 184, 191 (1998), and that truth defies the Government's attempt to forge a bright-line presumption from disparate decisions decided on their particular facts. The Government's claim that Congress has a "long tradition" of employing willfulness as reckless disregard to "induce ... adherence to the obligations of federal law" is in that respect a vast overstatement. U.S. Br. 10. For example, this Court has held that "willful" failures to comply with the Internal Revenue Code, *Cheek v. United States*, 498 U.S. 192, 201 (1991), federal firearm licensing regulations, *Bryan*, 524 U.S. at 196, and currency structuring laws, *Ratzlaf*, 510 U.S. at 149, *all* require a defendant to know it was violating the law.

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of credit based on risk; and increased availability of non-mortgage credit for low-income households. H.R. Rep. No. 108-263, at 23 (2003). According to Congress, these benefits have saved consumers as much as $100 billion annually. *Id.* Notably, in November, 2006, Oregon voters overwhelmingly rejected a ballot initiative that would have banned the use of credit history by insurers. *See Oregon Voters Defeat Credit Scoring Ballot Measure*, Insurance Journal, Nov. 8, 2006, *available at* http://www.insurancejournal.com/news/west/2006/11/08/74099.htm.

Edo also errs in urging this Court reflexively to transplant the reckless-disregard standard from the ADEA and the Fair Labor Standards Act (FLSA) into § 1681n(a) of FCRA. Resp. Br. 25-27. He ignores the unique legislative history that drove this Court's conclusions about those statutes in *Thurston* and *Richland Shoe* and the far more punitive consequences that attend a "willful" violation of FCRA. And to the extent he emphasizes that the willfulness provisions of the ADEA and FLSA were enacted only a few years before the willfulness provisions of FCRA, Resp. Br. 28, he neglects to mention that the willfulness provision at issue in *Ratzlaf* was passed *by the same Congress* and *in the same legislation* as FCRA. *See* Pub. L. No. 91-508, 84 Stat. 1114 (Oct. 26, 1970).[9]

2. In addition to defying the canon against inconsistent construction of the same term in the same statute, Edo's structural arguments invert the meanings of "knowingly" and "willfully" in an unprecedented way: this Court has consistently read "willfully" to require *more* than "knowingly" when both terms are employed in the same statutory scheme. *See, e.g., Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006).

Edo's approach also would have the strange result of grounding liability for a violation of § 1681m(a)'s technical notice requirement on a lesser showing of *mens rea* than that required to prove a false pretense violation under § 1681n(a)(1)(B). Edo defends this result by insisting that notice violations were "more central to Congress's concerns," Resp. Br. 23 n.12, but that is unlikely since, in contrast to a false pretenses violation, a violation of the notice requirement is not criminally punishable. Nor does

[9] The Government's citation of circuit court cases interpreting statutes other than FCRA in which "willfully" has been read to mean reckless disregard (U.S. Br. 11) are far less persuasive than the circuit courts that have read "willfully" *in § 1681n(a)* to require an act that the defendant knows to violate the law. GEICO Br. 26 n.16 (collecting cases). Particularly unpersuasive are the Government's references to cases interpreting Title VII and the Americans with Disabilities Act, *which use the term "reckless"—not "willful."* U.S. Br. 11-12.

the notice provision provide the exclusive or even primary vehicle through which the statute accomplishes its purpose of ensuring "accuracy and fairness of credit reporting."[10] *Id.* (citing 15 U.S.C. § 1681(a)).

Edo's principal structural argument is his claim that the use of "knowingly" to modify "without a permissible purpose" in § 1681n(a)(1)(B) would be superfluous if a "willful[] fail[ure] to comply" in § 1681n(a) already requires proof that the defendant violated a known duty. Resp. Br. 19. But "knowingly" is not superfluous if understood to refer to "factual knowledge," as this Court has often held in statutes where the term is paired with "willfully." *See Bryan v. United States*, 524 U.S. at 192. Moreover, this usage is perfectly consistent with how the term is employed in §§ 1681q and r.

Of course, "factual knowledge" that one is acting "without a permissible purpose" implies knowledge of what purposes are permissible, which overlaps but is not coterminous with the willfulness requirement that one know his conduct is unlawful. Congress may well have chosen to use the term "knowingly" in § 1681n(1)(B), instead of "willfully," to make it clear that a consumer could recover damages under 1681n when a report was obtained under false pretenses (or for an impermissible purpose), without proof that the defendant harbored the "willful intent to injure" that is generally required by 15 U.S.C. § 1681h(e) for actions in the nature of invasion of privacy, "except as provided in sections 1681n and 1681o." 15 U.S.C. § 1681h(e); *see also* § 1681t(b) (explaining scope of state law preemption). In any event, its language is entirely consistent with § 1681n(a)'s graduated penalty scheme: under § 1681n(a)(1)(A), a defendant is liable for statutory damages of between $100 and $1000 for knowingly violating *any provision of the Act*, whereas under § 1681n(a)(1)(B), a defendant is liable for greater statutory damages of no less than $1000 for acting in a way he knows violates *§ 1681b(a)*

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[10] *See, e.g.*, 15 U.S.C. §§ 1681b, 1681e, 1681g, 1681i.

(which enumerates the permissible purposes for which a consumer report may be obtained). Section 1681n(a)(1)(B)'s harsher sanction derives from its narrow focus on conduct that Congress adjudged particularly culpable—an interpretation confirmed by the Act's criminal punishment of that specific misconduct. *See* § 1681q.

Contrary to the Government's assertion, moreover, recklessness fits at least as naturally under 1681o (negligent noncompliance) as under 1681n(a). U.S. Br. 15-16. Our legal system typically groups negligence and recklessness together as "general intent," while separately classifying knowing or intentional behavior as "specific intent."[11] Here, the difference between merely reckless conduct and conduct undertaken with an intent to violate the law corresponds with the distinction between actual damages and potentially ruinous statutory and punitive damages.

At best, Edo's structural arguments identify imperfections in FCRA's scheme that create ambiguity. But ambiguity in this case invites application of principles of lenity to § 1681n(a)'s *mens rea* requirement in light of the "quasi-criminal" nature of the punitive and statutory damages authorized by that section, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001), and the statute's use of the same "willful" standard in the Act's criminal provisions, *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) (applying lenity in interpreting civil statute that employs same material term as criminal provision).[12]

Contrary to Edo's view, constitutional doubt also militates for a higher *mens rea* given § 1681n(a)'s provision for punitive and unbounded aggregate statutory damages without proof of any actual harm. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574-75 (1996) (disproportionate punitive

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[11] Richard G. Singer, *The Proposed Duty to Inquire as Affected by Recent Criminal Law Decisions in the United States Supreme Court*, 3 Buff. Crim. L. R. 701, 729 n.75 (2000).

[12] Penalty provisions are generally "strictly construed." *See, e.g., Ivan Allen Co. v. United States*, 422 U.S. 617, 627 (1975).

damages requires a greater showing of reprehensibility); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (same). Edo's retort that he has foresworn punitive damages and that no class has yet been certified ignores this Court's teaching that the doctrine of constitutional doubt applies *"whether or not [the] constitutional problems pertain to the particular litigant before the Court."* *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (emphasis added).

While, as Edo notes, Congress and the common law have authorized punitive damages for reckless conduct, they rarely if ever do so in an uncapped fashion, absent actual harm, where the violation is a technical one.[13] And contrary to Edo's suggestion, the provision of punitive damages for a reckless failure to send an adverse-action notice would be anomalous given the unavailability of punitive damages for the violation of a variety of important federal rights, including intentional violations of civil rights laws.[14]

**B.** Even if willfulness meant recklessness, however, it would in this context require a showing that GEICO disregarded an objectively high and unjustifiable risk that its conduct was unlawful. *See Farmer v. Brennan*, 511 U.S. 825, 836 (1994). The obviousness of the risk that GEICO's

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[13] ECOA and Title VII both limit the amount of punitive damages recoverable under statute. *See* 15 U.S.C. § 1691e(b); 42 U.S.C. § 1981a(b)(3). The civil rights statutes proscribe the deprivation of rights enshrined in the Constitution, the violation of which is inherently reprehensible. *See, e.g., S. Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001, 1011 (9th Cir. 2005) (discrimination is "a special area of public concern where affront to human rights may require high punitives"). And environmental statutes provide for statutory or punitive damages to deter conduct that creates a risk of serious and widespread harm. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(b) (providing civil penalties of up to $25,000 per day per violation). All of the other statutes upon which Respondents rely require actual damages as a predicate to recovery of punitive or statutory damages.

[14] *See, e.g., Barnes v. Gorman*, 536 U.S. 181, 185-89 (2002) (holding that because punitive damages are not available in private actions for discrimination under Title VI, they are similarly unavailable under the ADA or the Rehabilitation Act).

conduct violated the law is therefore a dispositive, purely legal question that can and should be decided by a court on motion before necessitating discovery of GEICO's privileged communications with its attorneys. This Court should address that question and hold that GEICO's motion for summary judgment was properly granted by the district court. As the district court already recognized, GEICO's interpretation of FCRA's adverse-action notice requirements was far from groundless, and this Court's ruling on that issue will provide needed guidance to the lower courts.

1. As the Government correctly notes, reckless disregard of the law "bespeaks an aggravated or extreme departure from standards of ordinary care," which necessitates proof of an "unjustifiably high risk" or "high degree" of probability that the defendant's conduct is unlawful. U.S. Br. 21. The probability that the defendant's conduct is unlawful must be "*substantially* greater than that which is necessary to make [the defendant's] conduct negligent." Restatement (Second) of Torts § 500 (1965) (emphasis added); *see also id.* at cmt. g (stating that the difference between negligence and recklessness "is a difference in the degree of the risk ... so marked as to amount substantially to a difference in kind"); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 134-35 & n.13 (1988). That is, recklessness denotes a risk of unlawfulness that is quantitatively and qualitatively greater than a merely unreasonable risk.

Recognizing this distinction, the Court has explained that an act taken in reckless disregard of the law refers to "a thing done *without ground* for believing it is lawful." *United States v. Murdock*, 290 U.S. 389, 394 (1933) (emphasis added). Consequently, "the extent to which the law was well-established and clearly understood must be part of the analysis." U.S. Br. 22; *see Screws v. United States*, 325 U.S. 91, 103 (1945) (interpreting "willfully" to require an objective inquiry into whether defendant acted in reckless disregard to a "right made definite" by the law); *Kolstad v.*

*ADA*, 527 U.S. 526, 536-37 (1999) (recognizing that a reckless-disregard finding would be improper where the underlying theory of discrimination was novel or otherwise poorly recognized).

Edo alludes to two different forms of recklessness. Resp. Br. 44-46. The first, referred to as "[c]ivil-law recklessness," bespeaks a "fail[ure] to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer*, 511 U.S. at 836. The second, termed "[c]riminal recklessness," requires a higher showing that the defendant *was in fact* aware of the unjustifiably high risk. *Id.* at 836-37. Though the latter standard originally developed in the criminal law, this Court held in *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 107 (1893), that it was "well settled" that claims for punitive damages under the common law required poof of "criminal indifference to civil obligations," and this Court has subsequently used that standard in statutes authorizing punitive damages. *See, e.g., Kolstad*, 527 U.S. at 535 (Title VII); *Smith v. Wade*, 461 U.S. 30, 50 (1983) (§ 1983); *see also, Farmer*, 511 U.S. at 839 (*Bivens* action); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation). Contrary to Edo's (and the Ninth Circuit's) understanding, these precedents unequivocally would require application of that "criminal recklessness" standard here. Indeed, criminal recklessness was adopted by this Court in the *Thurston/Richland Shoe* line of cases.[15]

Edo complains that the absence of an objectively

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[15] *See TransWorld Airlines v. Thurston*, 469 U.S. 111, 129-30 (1985) (focusing on what the defendant "knew" or might have "overlooked"). Likewise, *Kolstad* explained that an employer does not act in reckless disregard when it "discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability." 527 U.S. at 536-37 (citing *Hazen Paper*). Circuit courts have interpreted this to denote the criminal recklessness standard. *See, e.g., Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 777 (7th Cir. 2001).

excessive risk that GEICO's conduct was unlawful should not render GEICO's subjective apprehension of the risk irrelevant. Resp. Br. 46. But that consequence follows necessarily from the definition of recklessness, in both its "civil" and "criminal" forms. A determination that a defendant's conduct was *not* excessively risky necessarily obviates any subjective inquiry into whether the defendant "knew" (or should have known) its conduct posed an excessive risk. *See Prof'l Real Estate Investors v. Col. Pictures Indus.*, 508 U.S. 49, 65-66 (1993) (granting summary judgment without considering defendant's subjective motivations, "which were rendered irrelevant by the objective legal reasonableness" of its legal position).[16]

Edo also protests that the objective risk posed by a defendant's conduct should be gauged by the fact-finder. Resp. Br. 50. The courts' treatment of reckless disregard will naturally vary with context, depending, for example, on whether a defendant is said to have recklessly disregarded the truth, *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657 (1989), the welfare of another, *Farmer*, 511 U.S. at 837, or the law, *Kolstad*, 527 U.S. at 535. Here, where the issue is reckless disregard of the *law*, and the facts are not in dispute, the determination whether the defendant's conduct posed an excessive risk of unlawfulness is paradigmatically a legal question for the court.

As the Government urges (Br. 23), moreover, this inquiry should be undertaken "at an early stage of the case" because it involves a "purely legal" determination that can streamline the litigation. That approach also serves to ensure that defendants will need to waive the attorney-client privilege only when actually necessary to resolve the issue of recklessness. *See Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) (considering potential interference with attorney-client privilege in rejecting proposed consultation

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[16] Concomitantly, a defendant's subjective "belief" cannot trigger liability where the law is sufficiently ambiguous to be objectively "unknowable." *Screws v. United States*, 325 U.S. 91, 105 (1945).

exception to the Fifth Amendment).[17] *See* GEICO Br. 11 (explaining it must produce all privileged communications on remand absent relief in this Court).

2. The Government acknowledges that, even if GEICO's interpretation of the notice requirement was erroneous, it "did not reflect such an extreme departure from the range of responsible judgment as to be either tantamount to a knowing violation of the law or to reflect such heedless disregard of its duty to comply with the law." U.S. Br. 29-30. That conclusion is correct for several reasons. *First*, and foremost, the statutory text is not without ambiguity, as the Government and even Edo have admitted.[18]

*Second*, GEICO did not have the benefit of any authoritative guidance from any court or agency. As the Ninth Circuit noted, the interpretations of §§ 1681a(k)(1)(B)(i) and 1681m were questions of first impression before the district court. Pet. App. 15a.[19] And despite Edo's protestations to the contrary (*see, e.g.*, Resp. Br. 7-8, 50, 58-60), the Government acknowledges that the FTC has never issued authoritative guidance on the interpretation of the relevant provisions of FCRA.[20] U.S.

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[17] Edo's attempts to distinguish the immunity cases cited by GEICO miss the point. Regardless of the reason for inquiring into the obviousness of the alleged violation (in those cases, a desire not to chill official action or first amendment speech, here the "excessive risk" element of recklessness), the clarity of the law is a determination for the court that is most appropriately made at the earliest possible stage.

[18] U.S. Br. 29; Pls.' Mem. Resp. to Defs.' Renewed Mot. for Sum. J., district court docket 112.

[19] Edo and his amici contend that *Mick v. Level Propane Gases, Inc.*, 203 F.R.D. 324 (S.D. Ohio 2001), and *Scharpf v. AIG Marketing, Inc.*, 242 F. Supp. 2d 455 (W.D. Ky. 2003), should have provided notice to GEICO that its conduct was unlawful. But *Mick* expressly declined to decide whether charging a customer more than the best possible rate constitutes adverse action, and *Scharpf* articulated the dictum on which Edo relies *after* GEICO discontinued the policy at issue here.

[20] The so-called Ball Letter relied upon by Edo is an informal FTC staff opinion that, by its own terms, was "not binding on the Commission." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), *available at* http://www.ftc.gov/os/statutes/fcra/ball.htm. Edo also cites the FTC's

Br. 29. Nor could it, since it lacks legislative rule-making authority with respect to these provisions.[21] Edo's claim that GEICO was willful in not seeking further guidance from the FTC, Resp. Br. 49, is absurd since the FTC's response would not even have been binding on the agency.

*Third*, GEICO's view of adverse action comports with the State of Nebraska's interpretation of its Model Act Regarding Use of Credit Information in Personal Insurance, which contains a virtually identical definition of "adverse action." *See* Neb. Rev. Stat. § 44-7704(1).[22] Like GEICO, Nebraska reads the text to require notice "only if the insured experiences an increase in the rate over the rate that would have been charged with a neutral credit score."[23]

*Finally*, the district court *agreed* with GEICO's position, finding it "well-reasoned and thoughtful." Pet. App. 38a n.1.

3.a. Fearful of this Court's legal judgment, Edo belatedly attempts to manufacture disputed issues of fact where there are none. Edo has lodged with the Court later-discovered documents, which he says suggest that GEICO "knew" that the Ninth's Circuit's reading was the correct interpretation of FCRA's notice requirement. This foray into non-record material violates one of the most fundamental tenets of appellate practice.[24] But even if these

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"Notice to Users of Consumer Reports" for the proposition that "adverse action" is defined "broadly." 16 C.F.R pt. 601, app. C. Nothing in the notice, however, suggests the Ninth's Circuit's "best possible" score baseline.

[21] The Commission has authority to promulgate rules and regulations only in discrete and specific circumstances not applicable here. *See, e.g.*, 15 U.S.C. § 1681a(q) (allowing the Commission to define "identity theft" and "identity theft report"). In contrast, Congress gave *other* agencies broad authority to promulgate rules and regulations. *See id.* § 1681s(e).

[22] Nebraska's definition of "adverse action" differs from FCRA only by its inclusion of the word "personal" in the phrase "in connection with the underwriting of *personal* insurance." (emphasis added).

[23] *See* Letter from Eric Dunning, Neb. Dep't of Ins., to James A. Pugh (Mar. 8, 2006). GEICO has sought leave to lodge this document with the Court under Supreme Court Rule 32.3.

[24] *See* Robert L. Stern et al., *Supreme Court Practice* 650 (8th ed. 2002) (arguments based on non-record materials have been consistently condemned by the Court); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503,

materials were properly before the Court, they do not advance Edo's argument. The cited Status Report contains nothing more than the early, informal, inconclusive, "brainstorm[]" musings of non-lawyers about possible ways to satisfy the adverse-action notice requirement. It sheds no light on GEICO's beliefs regarding the policy it ultimately adopted and applied to Edo. And, most importantly for present purposes, it is completely irrelevant to this Court's determination whether the lawfulness of that policy was sufficiently colorable to obviate any need to proceed with a subjective inquiry. Edo's inappropriate attempt to ensnare this Court in irrelevant factual issues simply highlights the importance of employing an objective threshold test.

Edo's other attempts to manufacture a factual controversy by mischaracterizing deposition testimony[25] and GEICO's statements to regulators[26] equally have no bearing on the objective merits of GEICO's interpretation of the law. And his newly-voiced doubts about GEICO's use of a neutral credit weight (Resp. Br. 10-12) are irrelevant, as Edo unequivocally conceded and the lower courts found that GEICO's methodology compared the premium he was actually offered with the premium he would have been

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518 n.22 (1981) (declining to consider facts outside the record).

[25] Edo mischaracterizes the testimony of Paul Lavrey, who simply agreed that if Edo's "placement was based on the highest credit weight," then, *under the procedure employed in 2003*, GEICO would have issued an adverse action notice. SER 509-10 (Lavrey Dep. at 141:1-21, 142:1-10). This testimony is completely immaterial to GEICO's policy at the time of Edo's application.

[26] Edo spuriously claims that GEICO misled the Oregon Insurance Division by stating that "all applicants get written disclosure if an adverse action ... is made based on a credit report." Resp. Br. 13. But GEICO's representation was entirely consistent with its interpretation of what it means to take adverse action "based ... on" a credit report. Edo also challenges GEICO's statement that there are no situations in which treatment differs from the "treatment offered to [those with the] best credit scores." *Id.* The accuracy of that statement is completely irrelevant to the merits of this case, but in any event GEICO expressly informed Oregon regulators that applicants with good credit are treated more favorably. *See* ER 158.

offered "had [GEICO] not considered his credit information." JA 31; *see also* Pet. App. 46a; *id.* at 21a.[27]

b. Contrary to Edo's argument, whether GEICO's interpretation of FCRA was sufficiently reasonable to refute the charge of willfulness as a matter of law was a "subsidiary question fairly included" within the questions presented, S. Ct. Rule 14(a), particularly when the questions GEICO presented are read in light of the text of its petition for certiorari. *See Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978) ("[O]ur power to decide is not limited by the precise terms of the question presented.").

The first of GEICO's questions presented asked whether the Ninth Circuit's standard "impermissibly permits a finding of willfulness to be based ... upon conduct that is objectively reasonable as matter of law," and the certiorari petition argued that "GEICO's actions were objectively reasonable as a matter of law, precluding any finding of willfulness." GEICO Pet. 24. GEICO's basis for challenging the Ninth Circuit's ruling was thus expressly grounded in part on that court's failure to appreciate the objective reasonableness of GEICO's conduct. *Kolstad*, 527 U.S. at

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[27] GEICO's methodology is in any event straight-forward. As previously explained, GEICO uses credit scores and other information to predict the ratio between losses and premiums (the "loss ratio"), which underlies its company and tier-placement decisions. To that end, consumers' attributes are weighted based on their predictive correlation with loss. So, for example, a higher (better) credit score will receive a higher weight. *See generally* JA 63-68. When, as here, GEICO wants to determine how it would have treated a consumer without considering her credit report (or in circumstances where GEICO cannot locate the credit report or the consumer refuses to disclose it), GEICO simply substitutes for the weight associated with the consumer's actual credit score a "neutral" weight that corresponds to an average loss ratio, which effectively takes risks associated with credit out of the equation. *See* JA 45-46. Use of a neutral factor in circumstances where credit is unavailable has been approved by 26 states, GEICO Br. 5 & n.5, and is endorsed by the National Association of Insurance Commissioners. Nicole Harner Williams, *The Use of Credit Scoring in Insurance Underwriting*, Insurance and Financial Services Report 10 (Fall 2004). As the Ninth Circuit observed, an average credit score will correspond generally to a neutral credit weight. Pet. App. 13a.

540 (an issue "integral to the resolution of the case" can be treated as "fairly subsumed" by the questions presented). Edo cannot complain of any lack of notice here. *See Missouri v. Jenkins*, 515 U.S. 70, 86 (1995) ("[T]here is no unfairness or imprudence in deciding issues that have been passed upon below, are properly before us, and have been briefed by the parties.").

Nor are there prudential reasons to refrain from applying FCRA's "willful" standard to GEICO's conduct. The question of GEICO's objective reasonableness is based on undisputed facts, has been fully briefed, and is a pure question of law. In similar circumstances, this Court has not hesitated to apply a statute in the course of explaining what the statute means. *See, e.g., Thurston*, 469 U.S. at 128-30 (applying reckless disregard standard). There are powerful reasons to do so here. The briefs for both sides are replete with examples of courts and practitioners struggling in various contexts to apply this Court's teachings on the meanings of "willfulness," "reckless disregard," and other abstract scienter requirements. In considering the second question presented in this case, the Court unavoidably will come to a conclusion about the objective merits of GEICO's interpretation of FCRA's adverse-action notice requirement. Should it disagree with GEICO's statutory interpretation, the Court would provide lower courts and practitioners substantial guidance by applying the willfulness standard that it adopts to the concrete circumstances of this case. *Cf. Strickland v. Washington*, 466 U.S. 668, 698 (1984) ("Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles.").

## CONCLUSION

For the reasons set forth, this Court should reverse the judgment of the Court of Appeals and dismiss Edo's claim against GEICO.

Respectfully submitted,

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# ADDENDUM

# STATUTORY ADDENDUM[1]

## 15 U.S.C. § 1681a. Definitions; rules of construction

* * *

(m) Credit or insurance transaction that is not initiated by the consumer. The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of-

(1) reviewing the account or insurance policy; or
(2) collecting the account.

* * *

## 15 U.S.C. § 1681h(e). Conditions and form of disclosure to consumers

* * *

(e) Limitation of liability. Except as provided in sections 616 and 617 [15 USCS §§ 1681n and 1681o], no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615 [15 USCS § 1681g, 1681h, or 1681m], or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report[,] except as to

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[1] Additional statutory provisions replied upon by GEICO are set forth in the appendix to the Government's brief.

false information furnished with malice or willful intent to injure such consumer.

**15 U.S.C. § 1691 (Equal Credit Opportunity Act). Scope of prohibition**

* * *

(d) Reason for adverse action; procedure applicable; "adverse action" defined.

* * *

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

* * *

**12 C.F.R. § 202.2. Definitions**

* * *

(c) Adverse action-(1) The term means:

(i) A refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered;

(ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts; or

(iii) A refusal to increase the amount of credit available to an applicant who has made an application for an increase.

(2) The term does not include:

(i) A change in the terms of an account expressly agreed to by an applicant.

(ii) Any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account;

(iii) A refusal or failure to authorize an account transaction at point of sale or loan, except when the refusal is a termination or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts, or when the refusal is a denial of an application for an increase in the amount of credit available under the account;

(iv) A refusal to extend credit because applicable law prohibits the creditor from extending the credit requested; or

(v) A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested.

(3) An action that falls within the definition of both paragraphs (c)(1) and (c)(2) of this section is governed by paragraph (c)(2) of this section.

* * *